STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANGEL NICOLE ROUSH,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHRISTINA MAY BOUDRIE,

Respondent-Appellant.

UNPUBLISHED
December 14, 2004

No. 256051
Monroe Circuit Court
Family Division
LC No. 03-017728-NA

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(i), (g), (j) and (k).[1] We affirm.

This case came to the attention of the Family Independence Agency when the minor child, then twenty-one months old, was brought to the emergency room with injuries reportedly caused by falling out of bed onto a clock radio, but which were not consistent with that explanation. She was diagnosed with subdural hematoma, retinal hemorrhages, and facial trauma. Medical testimony indicated that her injuries were consistent with shaking and multiple blows to the head of significant impact. As a result of these events, petitioner sought termination of respondent's parental rights at an initial dispositional hearing. MCR 3.977(E). Also as a result of these events, respondent was criminally charged with first-degree child abuse. MCL 750.136b(2). With the agreement of all parties, the trial court ordered that the termination matter be heard in conjunction with the criminal trial. The court cited interests of judicial economy, noting that numerous doctors would be called to testify, and their testimony could be taken during one trial. In the criminal matter, the jury found respondent guilty of first-degree child

[1] The order was entered by Monroe Circuit Judge Joseph A. Costello. Judge Costello is not a judge in the Family Division, but heard the termination trial in this matter because it was consolidated with respondent's criminal trial for first-degree child abuse, MCL 750.136b(2). Respondent's counsel stipulated to this arrangement.

abuse. The trial court took judicial notice of the verdict for purposes of the termination trial. The trial court found that several of the statutory grounds for termination were shown by clear and convincing evidence, concluded that termination of respondent's parental rights was in the best interests of the child, and entered an order terminating respondent's parental rights.

On appeal, respondent first asserts that the trial court erred by failing to make appropriate inquiry into the child's Indian heritage as required by the Indian Child Welfare Act (ICWA), 25 USC 1901, *et seq*. Whether the trial court satisfied the notice requirements of the ICWA is a legal question of statutory interpretation that is reviewed de novo. *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999). The statement by the minor child's grandmother during proceedings in the lower court that she had some Algonquin ancestors was sufficient to require petitioner to comply with the ICWA's notice provisions. *Id.* at 444, 446. The petitioner was thus required to send notice of the proceedings to the tribe or, if the tribe could not be determined, to the Secretary of the Interior. *Id.* at 448; 25 USC 1912(a). Because Algonquin is not a tribe within the meaning of the ICWA, only notice to the Secretary of the Interior was required. In Michigan, such notice is to be provided to the Minneapolis Area Director, Bureau of Indian Affairs. *Id.* at 448, n 4.

On two occasions prior to the termination trial in this matter, counsel for petitioner advised the court that notices had been sent pursuant to the ICWA, no tribe had indicated that the minor child was eligible for membership, and counsel for respondent made no objection to this representation. Petitioner has also submitted with its brief on appeal an affidavit by social worker Carol Gustafson, notarized on December 15, 2003, indicating that appropriate notice was sent to the Minneapolis Area Director of the Midwest Bureau of Indian Affairs by registered mail with return receipt requested. While this document is not part of the record supplied to our Court on appeal, MCR 7.210(A), we believe that since neither its inclusion nor its authenticity is challenged by any party, it would be a waste of judicial resources and a pointless act to remand for expansion of the record concerning ICWA compliance, as this Court has done when necessary. See *In re TM (After Remand)*, 245 Mich App 181, 185; 628 NW2d 570 (2001).[2] We therefore conclude that no relief is warranted on this claim.

Respondent next claims that the trial court erred by taking judicial notice of respondent's conviction of first-degree child abuse and by relying on evidence from that proceeding to terminate her parental rights. The assertion that the trial court improperly considered the evidence from the criminal proceeding ignores the underlying fact that the criminal and termination matters were consolidated, with the agreement of the parties, to be heard in conjunction with one another before the circuit court. Thus, the evidence admitted for purposes of the criminal trial was at the same time admitted for purposes of the termination trial. It appears quite clear from the record that all parties understood that the overlapping portions of the two matters were being heard simultaneously; the criminal matter by a jury, the termination matter by the judge.

[2] See also MCR 7.216(A)(4), granting this Court discretion to permit additions to the record on appeal.

Secondly, the trial court did not err by taking judicial notice of respondent's conviction of first-degree child abuse. Judicial notice may be taken of facts "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). Respondent concedes on appeal that the jury's verdict was not subject to reasonable dispute. Indeed, a circuit court may take judicial notice of the files and records of the court in which it sits. *Snider v Dunn*, 33 Mich App 619, 625; 190 NW2d 299 (1971). Furthermore, evidence of a party's criminal conviction for the same conduct at issue in a civil matter is relevant evidence that is admissible in the civil matter unless precluded by constitution, rule of evidence or court rule. *Waknin v Chamberlain*, 467 Mich 329, 333; 653 NW2d 176 (2002).[3] Respondent has not asserted any rule or constitutional provision precluding the admission of criminal conviction in the termination proceedings. *Id.* at 333. Therefore, this claim is without merit.

Respondent also contends that she was denied the effective assistance of counsel in the trial court. Because respondent did not move for an evidentiary hearing or a new trial, this Court's review is limited to matters apparent on the existing record. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). To prevail on a claim of ineffective assistance of counsel, respondent must show that her trial counsel's performance was deficient, that is, it "fell below an objective standard of reasonableness" and that respondent was so prejudiced that she was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In order to show prejudice, respondent must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). An attorney's use of an unsuccessful trial strategy does not mean that the attorney was constitutionally ineffective. *In re CR*, 250 Mich App 185, 199; 646 NW2d 506 (2002). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *In re Simon*, 171 Mich App 443, 448; 431 NW2d 71 (1988).

Respondent faults her trial counsel for stipulating to combine the termination trial with her criminal trial for first-degree child abuse. Respondent argues that she was deprived of a substantial defense because the focus of the criminal proceedings was respondent, while the focus in the disposition matter should have been the child and her best interests. Respondent also argues that, because of the consolidation of the two matters, she was not allowed the opportunity to examine and controvert reports or to cross-examine the individuals who made those reports as they related to the dispositional proceedings. We cannot conclude that the performance of respondent's trial counsel fell below an objective standard of reasonableness based on the agreement to consolidate the criminal and termination proceedings. *Pickens, supra*. Those witnesses common to the criminal and termination matters gave testimony concerning the nature of the minor child's injuries or testimony directed to the issue of whether respondent was

[3] There is no unfairness in the application of this principle to the instant case because the standard for conviction of a criminal offense – beyond a reasonable doubt – is higher than the clear and convincing standard applied to the termination proceedings. See *In re Miller*, 182 Mich App 70, 75; 451 NW2d 576 (1990) ("beyond a reasonable doubt" standard applied to proceedings involving Indian children is higher than standard of "clear and convincing evidence").

the person who caused the injuries. The dual nature of the proceedings would cause no conflict in the objective of respondent's counsel with respect to these witnesses, which in both proceedings was to develop a theory that the perpetrator of the injuries was someone other than respondent or the injuries were accidental. Furthermore, the consolidation arrangement in no way prevented respondent's attorney from calling these or other witnesses to address matters relating only to the termination trial or specifically to the child's best interests. This is plainly shown by the fact that some witnesses testified partially before the jury, but also before the judge concerning matters relating only to the termination proceedings. Further, after the jury was excused on the third day of trial, while it deliberated on the fourth day, and after it gave its verdict, the court continued to hear witnesses offering testimony relevant to the termination proceeding. It is clear on this record that the consolidation of the criminal and termination matters did not deprive respondent of the ability to present evidence relating specifically to the termination matter, or concerning the best interests of the child, and did not deprive her of a substantial defense.

Our review of respondent's complaint that she was unable to cross-examine the authors of reports or to controvert reports admitted into evidence relating to the disposition is hampered by respondent's failure to identify the reports in question. Further, because respondent has not specified how she would have controverted the reports, or indeed which reports she was denied the opportunity to controvert, there is no basis to conclude that, but for counsel's alleged unprofessional error, the result would have been different. *In re CR, supra* at 198.

Respondent also faults her attorney for failing to call any witnesses in the termination matter, and for counseling respondent not to testify. Respondent contends that this constituted inadequate performance because "[a] grant of petition for termination of parental rights is mandatory absent any evidence from the parent addressing the child's best interest." *In re IEM, supra* at 451. However, in *In re Trejo,* 462 Mich 341, 353-354; 612 NW2d 406 (2000), the Supreme Court specifically rejected the rule that if a parent does not put forth evidence concerning best interests, termination is automatic. The Court held that "even where no best interest evidence is offered after a ground for termination has been established . . . subsection 19b(5) permits the court to find from evidence on the whole record that termination is clearly not in the child's best interests." *Id.* at 353. Thus, counsel did not deprive respondent of a substantial defense merely by failing to produce witnesses on the best interests question. Counsel's decision was apparently one of trial strategy, which this Court will not second guess. *In re Simon, supra* at 448. On this record, there is no basis to conclude that counsel's failure to present witnesses in the termination matter constituted performance falling below a reasonable standard of objectiveness. Moreover, where there is no indication as to what testimony might have been offered by respondent or by any other witness whom counsel should have called, there is no basis to conclude that the result below might have been different, but for counsel's alleged errors.

Respondent also challenges the sufficiency of the evidence for the termination of her parental rights. The trial court did not clearly err by finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989).

There is no dispute concerning the fact that the minor child suffered severe physical injury, and the record does not reasonably permit any other conclusion than that the injury was

inflicted on the child. Medical testimony indicated that the child's injuries were not consistent with the explanation offered. She suffered from swelling and bruising across her face, to both sides of the face and forehead, bruising to both ears, a bilateral subdural hematoma, and retinal hemorrhages with more than fifty spots of bleeding in each eyeball. The medical testimony indicated that these injuries resulted from shaking and from multiple blows of significant impact.

Respondent contends, however, that the evidence did not demonstrate that she was the perpetrator of the abuse. However, the trial court did not clearly err in finding otherwise. *In re Miller, supra* at 337. The evidence indicated that respondent asked her-eleven-year-old sister, Rebekah, to put the minor child to bed, but Rebekah was not able to get the child to sleep. According to a statement by respondent, the child did not have any injuries when respondent took her from Rebekah. This is significant because the medical testimony indicated that the injuries that the child sustained would have been immediately apparent. Rebekah testified that respondent's reaction was "a little mad" when Rebekah brought the child back downstairs, and Logan Cloum, respondent's former boyfriend, also testified that respondent seemed upset when Rebekah called for her to put the baby to bed. Respondent's statements indicated that she then went upstairs with the child for a half hour to an hour. Mr. Cloum testified that when respondent returned after putting the child to bed, she stated that she had had to whip her to get her to sleep. Later, respondent stated, "I think I hurt Angel."

Respondent argues on appeal that the trial court clearly erred by crediting Mr. Cloum's testimony. However, this Court gives deference to the trial court's special opportunity to judge the credibility of the witnesses. *In re Miller, supra*. The trial court discussed the credibility of Mr. Cloum at some length, including the fact that he did not immediately report the statements by respondent. Nonetheless, the court found Mr. Cloum's testimony responsive and straightforward, and specifically found him a credible witness. We discern no reason to discount the trial court's carefully considered conclusion concerning Mr. Cloum's credibility. Given his testimony, the record was clearly adequate to support the trial court's conclusion that respondent caused physical injury to the minor child, and the trial court did not clearly err in so finding. *Miller, supra*.

Further, we are left with no impression that the trial court made a mistake by finding a reasonable likelihood that the minor child would suffer physical injury if returned to respondent's care. Testimony introduced in the trial court strongly suggested that the minor child had sustained previous inflicted injuries, including a brain trauma and burns to the hand or arm. Dr. Schlievert, a pediatrician specializing in child abuse injuries, testified that when there is a pattern of multiple injuries caused at different ages, it is unlikely that they were caused by different people. Given this history of injuries to the minor child, the trial court was justified in concluding that the child was at risk of further injury if returned to respondent.

Termination was also warranted on the ground that respondent failed to provide proper care and custody for the minor child, and there was no reasonable likelihood that she would be able to do so in the reasonable future. Testimony indicated that respondent engaged in daily drug use and frequently left the child unattended in the house while she went out. When the minor child was approximately five months old, respondent left her unattended on the street after midnight for more than one hour. Respondent would frequently leave the child outside her friend's house unattended in a stroller for periods of five or ten minutes. There was testimony that respondent would "smack [the minor child] around," and the child would laugh or cry,

depending on how hard she was hit. When taken into care, the minor child was developmentally delayed in all areas. Four months later, her development was in line with that of other children her age. Dr. Schlievert testified that the fact that her developmental delays appeared to resolve rapidly in another environment indicated that in prior months she likely was not getting the stimulation necessary for adequate development. The child had not received the proper immunizations and was not brought to the pediatrician for well child checkups. The evidence of pervasive abuse and neglect throughout the minor child's life amply justified the trial court's conclusion that respondent would be unable to provide proper care and custody for the minor child in the reasonable future.

Respondent argues that termination was erroneous because she was never offered services and given an opportunity to demonstrate that she could parent the child. In general, when a child is removed from the custody of the parent, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan. MCL 712A.18f(1), (2), (4). However, services are not required in all situations. *In re Terry*, 240 Mich App 14, 26, n 4; 610 NW2d 563 (2000). Also, a service plan need not be directed at reunification, MCL 712A.18f(3)(d). Because the instant case proceeded under a petition seeking termination of parental rights at the initial disposition, a treatment plan for respondent was not required. See MCL 712A.19b(4), MCR 3.977(E).

Finally, the trial court did not clearly err by finding that termination was not clearly contrary to the best interests of the child. MCL 712A.19b(5). Indeed, the evidence suggesting that termination was in the best interests of the child was overwhelming. We have already noted evidence that respondent frequently endangered the minor child by leaving her at home or outside unattended, "smacked [her] around," and used drugs on a daily basis. Most importantly, she was convicted of first-degree child abuse for the life-threatening battering of the minor child. While there was some evidence of a bond between respondent and the minor child, it is far outweighed by the pervasive evidence that the child would not be safe in respondent's care.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood